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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 ROCKY MOUNTAIN FARMERS UNION,
12 REDWOOD COUNTY MINNESOTA CORN
13 AND SOYBEAN GROWERS, PENNY
14 NEWMAN GRAIN, INC., GROWTH ENERGY,
15 RENEWABLE FUELS ASSOCIATION, REX
16 NEDEREND, FRESNO COUNTY FARM
17 BUREAU, NISEI FARMERS LEAGUE, and
18 CALIFORNIA DAIRY CAMPAIGN,

19 Plaintiffs,

20 vs.

21 JAMES N. GOLDSTENE, Executive Officer
22 of the California Air Resources Board,

23 Defendants.

24 and related intervenor and consolidated
25 actions and amici curiae.
26 _____/

CASE NO. CV-F-09-2234 LJO DLB
**ORDER ON DEFENDANTS' AND
INTERVENORS' FED. R. CIV. P.
56(d) MOTION (Doc. 137)**

27 **INTRODUCTION**

28 Defendants¹ and intervenor-defendants² (collectively "defendants") move to deny or continue

29 _____
30 ¹ Collectively, defendants are James N. Goldstene, in his official capacity as Executive Director of the California
Resources Board ("CARB"); Mary D. Nichols, Daniel Sperling, Ken Yeager, Dorene D'Adamo, Barbara Riordan, John R.
Balmes, Lydia H. Kennard, Sandra Berg, Ron Roberts, John G. Telles, and Ronald O. Loveridge, in their official capacities

1 plaintiffs³ pending summary judgment motions pursuant to Fed. R. Civ. P. (“Rule”) 56(d). Defendants
2 argue that good causes exists to deny or defer the pending motions because: (1) there is a likelihood that
3 controverting evidence exists as to certain material facts, specifically (a) whether the Low Carbon Fuel
4 Standard (“LCFS”) regulation burdens interstate commerce and/or favors in-state interests; (b) whether
5 the regulation has a negative effect on plaintiffs or plaintiffs’ members; and (c) whether plaintiffs or any
6 of their members have facilities that fall within the grandfather provision of the Energy Independence
7 and Security Act of 2007 (“EISA”), 42 U.S.C. §7545(o);(2) this information is not available to
8 defendants because discovery has not commenced in these consolidated actions; (3) defendants propose
9 specific interrogatories and requests for production, including a single deposition to obtain the
10 information sought; and (4) defendants believe that the information sought will demonstrate that the
11 LCFS does not burden interstate commerce or the economic interests of plaintiffs and plaintiffs’
12 members, does not favor in-state interests economically, and is not preempted by EISA. For the
13 following reasons, this Court GRANTS a Rule 56(d) continues, and sets a further briefing schedule on
14 the pending motions for summary judgment and preliminary injunction.

15 BACKGROUND

16 In these consolidated actions, plaintiffs challenge the LCFS regulations promulgated by
17 defendant California Air Resource Board (“CARB”) to implement provisions of California Assembly
18 Bill 32 (“AB 32:), California’s Global Warming Solutions Act of 2006, Cal. Heath & Saf. Code, §38500

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21 as members of CARB; Arnold Schwarzenegger, in his official capacity as Governor of the State of California, and Edmund
G. Brown, Jr., in his official capacity as California Attorney General.

22 ²Natural Resources Defense Council, Inc., Sierra Club, and Conservation Law Foundation are intervenor-defendants
23 in the consolidated actions.

24 ³ This action encompasses two consolidated cases. In action number 09cv2234, the plaintiffs are Rocky Mountain
25 Farmers Union, Redwood County Minnesota Corn and Soybean Growers, Penny Newman Grain, Inc., Growth Energy,
26 Renewable Fuels Association, Rex Nederend, Fresno County Farm Bureau, Nisei Farmers League, California Dairy
27 Campaign, National Petrochemical & Refiners Association, American Trucking Associations, Center for North American
28 Energy Security, and the Consumer Energy Alliance (collectively “Rocky Mountain plaintiffs”). Not all of the farmer
plaintiffs moved for summary judgment. Rather, only Growth Energy and Renewable Fuels Association (“producer
plaintiffs”) moved for summary judgment. In the member case, action number 10cv163, the plaintiffs are National
Petrochemical & Refiners Association, American Trucking Associations, Center for North American Energy Security, and
the Consumer Energy Alliance (collectively “National Petrochemical plaintiffs”). The Court refers to all moving plaintiffs
collectively as “plaintiffs.”

1 et seq. California's LCFS focuses on the "carbon intensity" of fuels to estimate emissions related to a
2 fuel's lifecycle, including greenhouse gases emitted when the fuel is extracted, refined, and transported
3 to California. The LCFS assigns different carbon intensity scores to more than a dozen corn ethanol
4 "pathways" in what are the direct effects of GHG emissions. Numerous distinctions are drawn among
5 different categories of corn ethanol producers. Significant to this litigation, the Lookup Table assigns
6 different carbon intensity scores to "California" and "Midwest" corn pathways.

7 Plaintiffs moved for summary judgment in their favor, arguing that the LCFS must be struck
8 down because it: (1) conflicts with and is preempted by federal law, including EISA, in violation of the
9 Supremacy Clause, U.S. Const. Article VI, para. 2; and (2) interferes with the regulation of interstate
10 commerce, in violation of the Commerce Clause, U.S. Const., Art. I, sec. 8, cl. 3.

11 In opposition to plaintiffs' summary judgment motions, defendants, *inter alia*, moved to deny
12 or defer summary judgment pursuant to Rule 56(d). This Court stayed briefing for the pending summary
13 judgment and preliminary judgment motions, and set a briefing schedule for the Rule 56(d) motion.

14 STANDARD OF REVIEW

15 Pursuant to Rule 56(d), formerly Rule 56(f), this Court has the discretion to either deny or
16 continue a motion for summary judgment "if a nonmovant shows by affidavit or declaration that, for
17 specified reasons, it cannot present facts essential to justify its opposition." Thus, this Court has
18 discretion to continue the pending summary judgment motions if the defendants need to discover
19 essential facts before filing the opposition. *Cal. Union. Ins. Co. v. American Diversified Sav. Bank*, 914
20 F.2d 1271 (9th Cir.1990), *cert. denied*, 498 U.S. 1088, 111 S.Ct. 966, 112 L.Ed.2d 1052 (1991). "A
21 request for additional time, more discovery, or ... a request to consider [] affidavits under [Rule 56(d)]
22 does 'oppose' the entering of summary judgment." *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 520 (9th
23 Cir.1990). Summary judgment should not be granted when one party has yet to exercise its opportunities
24 for pretrial discovery pursuant to Fed. R. Civ. P. 56(d). *See, National Life Ins. Co. v. Solomon*, 529 F.2d
25 59 (2d Cir.1975). "The general principle of Rule [56(d)] is that 'summary judgment should be refused
26 where the nonmoving party has not had the opportunity to discover information that is essential to his
27 opposition." *Price v. Western Resources, Inc.*, 232 F.3d 779, 793 (10th Cir.2000) (quoting *Anderson v.*
28 *Liberty Lobby*, 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

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- 1 7. State a) the dates on which you or your members commenced construction of their production
2 facilities, b) the dates you or they began operating the plants, c) the permitted capacity of any
3 plants under construction as of December 19, 2007, and d) identify any acknowledgment from
4 U.S. EPA that ethanol from those plants qualifies as “renewable fuel” under EISA.
- 5 8. For any plants under construction as of December 19, 2007, identify each such plant that has
6 applied to ARB for an individualized carbon intensity score under either Method 2A or Method
7 2B of the LCFS.
- 8 9. State the results of all internal studies or analysis in your custody or control that relate to the
9 scope and/or pricing for the non-California ethanol market for the years 2011-2021 or any period
10 therein.
- 11 10. Do you contend that you (or any of your members) will lose profits if the LCFS is not enjoined?
12 If so, state the amount of lost profits that each of you (or your members) claim and state all facts
13 and identify all documents on which these claims are based.
- 14 11. Do you contend that you (or any of your members) will go out of business if the LCFS is not
15 enjoined? If so, state all facts and identify all documents upon which these claims are based.
- 16 12. Do you or your members contend that the LCFS has discriminatory effects on non-California
17 ethanol producers and/or suppliers? If so, state all facts and identify all documents on which this
18 contention is based.
- 19 13. Describe any energy efficiency improvements that you or your members have made since 2007.
- 20 14. Identify all ethanol production facilities owned or operated by you or your members which have
21 suffered a loss of market share as a result of the LCFS.
- 22 15. Identify all ethanol production facilities owned or operated by you or your members which have
23 been unable to obtain financing as a result of the LCFS.
- 24 16. Do you or your members contend that the LCFS will not have any effect on the results of climate
25 change in California? If so, state all facts and identify all documents on which this contention
26 is based.

27 *Request for Document Production*

28 Defendants request that plaintiffs produce all documents identified in the response to the

1 interrogatories No. 7, 9, 10, 11, 12, and 16.

2 *Deposition*

3 Defendants seek to take the deposition of Robert Dinneen (“Mr. Dinneen”), President and CEO
4 of the Renewable Fuels Association, a plaintiff in this action. Defendants contend that Mr. Dinneen
5 gave a presentation to Wall Street analysts in December 2010 entitled “Ethanol Industry Update” in
6 which Mr. Dineen neglected to mention the LCFS or its allegedly devastating effect on the corn ethanol
7 industry. Defendants seek to depose Mr. Dinneen to gather information related to this presentation.

8 **Rocky Mountain Plaintiffs**

9 Although they find some of the discovery requests “puzzling,” the Rocky Mountain plaintiffs are
10 prepared to provide the information sought by Defendants in their discovery request, and willing to do
11 so. Thus, Rocky Mountain plaintiffs do not oppose this Rule 56(d) continuance. Accordingly, this
12 Court GRANTS defendants’ limited discovery requests as to the Rocky Mountain plaintiffs.

13 The Rocky Mountain plaintiffs make clear, however, that they “take at face value defendants’
14 statement that their discovery requests were intended to be ‘limited,’ ‘carefully tailored,’
15 ‘straightforward,’ and cause a six-week delay in the schedule previously set by this Court.” This Court
16 also takes these statements made by defendants at face value. Accordingly, this Court agrees with the
17 Rocky Mountain plaintiffs that a briefing schedule should be set for the supplemental briefing of the
18 pending motions and GRANTS in part that request.

19 **National Petrochemical Plaintiffs**

20 The National Petrochemical plaintiffs oppose defendants’ Rule 56(d) motion to the extent that
21 it would permit discovery that is not relevant to National Petrochemical plaintiffs’ summary judgment
22 motion. In the interest of comity, the National Petrochemical plaintiffs will not oppose a short delay if
23 other parties agree to conduct limited discovery, but the National Petrochemical plaintiffs contend that
24 none of the defendants’ discovery requests seek facts that are essential to oppose the limited legal issues
25 presented in their Rule 56 motion.

26 As to the deposition of Mr. Dinneen, the National Petrochemical plaintiffs do not specifically
27 oppose the deposition request. Both the Rocky Mountain plaintiffs and defendants aver that the National
28 Petrochemical plaintiffs have agreed to produce Mr. Dinneen for a deposition. This Court considers the

1 National Petrochemical plaintiffs’ failure to oppose specifically this request as a non-opposition.
2 Accordingly, this Court GRANTS defendants’ limited discovery request as to Mr. Dinneen.

3 As to the specified interrogatories and requests for document production, this Court must
4 determine whether defendants’ limited discovery request seeks information that is essential to oppose
5 the National Petrochemical plaintiffs’ summary judgment motion. The National Petrochemical plaintiffs
6 correctly point out that their Rule 56 motion is narrower than that filed by the Rocky Mountain plaintiffs.
7 The National Petrochemical plaintiffs’ summary adjudication motion is limited to two claims under the
8 Commerce Clause—(1) impermissible discrimination under interstate and foreign commerce and (2)
9 extraterritorial regulation of interstate and foreign commerce outside California—and does not address
10 arguments related to the Supremacy Clause. The National Petrochemical plaintiffs further point out that
11 defendants are not seeking discovery related to the extraterritorial claim or that the LCFS discriminates
12 on its face and that its purpose is to favor California transportation fuels. Defendants concede that their
13 discovery requests are related to the plaintiffs’ claims as they relate to the “effects” of the LCFS.
14 Moreover, the National Petrochemical plaintiffs argue that defendants are seeking information they
15 possess.

16 This Court agrees that defendants’ interrogatory and requests for document production do not
17 seek information that is essential to oppose the National Petrochemical plaintiffs’ summary adjudication
18 motion. Defendants’ interrogatories either seek information that they possess, seek information related
19 to the Supremacy Clause claim not raised by the National Petrochemical plaintiffs, or seek information
20 related to effects of the LCFS. The National Petrochemical plaintiffs make clear that their motion is not
21 based on whether the effects of the LCFS are discriminatory, and that the motion is based solely on a
22 question of law. Accordingly, this Court DENIES defendants’ request as to the interrogatories and
23 requests for production as to the National Petrochemical plaintiffs.

24 CONCLUSION AND ORDER

25 For the foregoing reasons, this Court:

- 26 1. GRANTS in part and DENIES in part defendants’ Rule 56(d) motion for a continuance;
- 27 2. GRANTS defendants’ unopposed, limited discovery request in full as to the Rocky
28 Mountain plaintiffs;

- 1 3. GRANTS defendants' unopposed request to depose Mr. Dinneen;
- 2 4. DENIES defendants' interrogatory request and request for production of documents as
- 3 to the National Petrochemical plaintiffs;
- 4 5. GRANTS the Rocky Mountain plaintiffs' request to set a further briefing schedule; and
- 5 6. SETS the following further briefing schedule:
- 6 a. Plaintiffs' responses to defendants' discovery requests and the Rule 30(b)(6)
- 7 deposition of Mr. Dinneen shall be conducted no later than **February 3, 2011**;
- 8 b. No later than **February 7, 2011**, the parties shall file a joint status report to
- 9 update the Court as to status of the limited discovery granted in this order. The
- 10 Court will consider whether all parties have been diligent and requests if a party
- 11 has not proceeded in a diligent and efficient manner;
- 12 c. Defendants' supplemental briefs on the pending motions shall be filed no later
- 13 than **February 17, 2011**;
- 14 d. Amicus Curiae briefs, if any, shall be filed no later than **February 28, 2011**;
- 15 e. Plaintiffs' oppositions and reply briefs on all pending motions shall be filed no
- 16 later than **March 11, 2011**;
- 17 f. Defendants' reply in support of their cross-motion for summary judgment shall
- 18 be filed no later than **March 25, 2011**;
- 19 g. After reading and reviewing the parties' arguments and attachments thereto, this
- 20 Court shall consider whether to set a date for a hearing on the pending motions.

21 IT IS SO ORDERED.

22 **Dated: January 14, 2011**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE